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Index of Cases, Etc.

No. 384.

SUPREME COURT OF THE UNITED STATES

October Term 1915

THE JAMES CLARK DISTILLING COMPANY,
Appellant,

vs.

THE AMERICAN EXPRESS COMPANY AND THE STATE OF WEST VIRGINIA,
Appellees.

Appeal from the District Court of the United States for the District of Maryland.

UPON RE-ARGUMENT.

BRIEF FOR THE STATE OF WEST VIRGINIA, APPELLEE.

Appellant's assignments of error appear at pages 54 and 55 of the record. We do not now have brief of counsel for appellant on re-argument. We assume, however, that the assignments of error relied upon by appellant on re-hearing will be the same as those relied upon at the former submission. The assignments of error then relied upon appear at pages 12 and 13 of brief formerly filed

on behalf of appellant. The first error so assigned and relied upon by counsel for appellant is stated as follows, viz:

> " In construing the law of West Virginia as undertaking to make the place of delivery in West Virginia the place of sale where a shipment of intoxicating liquor is transported by a common carrier from another state and delivered to the consignee in West Virginia for his personal use, in pursuance of a sale made by the shipper to the consignee in such other state."

Our answer to such assignment, in condensed form, is stated as follows, viz:

> Under the laws of West Virginia, in case of a sale in which a shipment or delivery of intoxicating liquors is made by a common or other carrier, the sale of such liquors shall be deemed to be made in the county in said state wherein delivery of such intoxicating liquors is made to the consignee by such common or other carrier; although the shipment might have been made by a dealer residing out of the state, upon an order received by him to be filled at his place of business, for shipment and delivery by the carrier to the consignee in West Virginia, for the personal use of the consignee.

FIRST.

Argument on First Assignment.

At the general election held in West Virginia in the year 1912 an amendment to the constitution of said state was ratified by the people thereof in the following words and figures:

> "On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby

prohibited in this State. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

On the 11th day of February, 1913, the legislature of appellee state enacted chapter 13, Acts 1913, the State Prohibition Law, generally known in the state, and hereinafter referred to in this brief, as the Yost law. Said amendment and law became effective on the first day of July, 1914. Sections 1, 2, 3 and 4 of the Yost law, (or so much thereof as seem to be pertinent to the assignment of error now under discussion) are now here set forth, as follows:

"Sec. 1. The word 'liquors' as used in this act shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act; and all liquors, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per centum of alcohol by volume, shall be deemed spirituous liquors, and all shall be embraced in the word 'liquors', as hereinafter used in this act.

"Sec. 2. Except as hereinafter provided, the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale of liquors or absinthe or any drink compounded with absinthe are forever prohibited in this state, except liquors maunfactured prior to July first, one

thousand nine hundred and fourteen, and stored in United States bonded warehouses in the custody of the United States collector of internal revnue, and the said liquors when tax paid and in transit from such warehouse to points outside of this state.

"Sec. 3. Except as hereinafter provided, if any person acting for himself or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months; and upon conviction of the same person for the second offense under this act, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense, or in introducing evidence and proving the same on the trial; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing offering or exposing for sale said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the de-

livery thereof is made by such carrier to the consignee, his agent or employee. * * * *

"Sec. 4. The provisions of this act shall not be construed to prevent any one from manufacturing for his own domestic consumption wine or cider; or to prevent the manufacture from fruit grown exclusively within this state of vinegar and non-intoxicating cider for use or sale; or to prevent the manufacture and sale at wholesale to druggists only of pure grain alcohol for medicinal, pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies; or to prevent the sale and keeping and storing for sale by druggists of pure grain alcohol for mechanical, pharmaceutical, medicinal and scientific purposes, or of wine for sacremental purposes, by religious bodies, or any United States pharmacopoeia or national formulary preparation in conformity with the West Virginia pharmacy law or any preparation which is exempted by the provisions of the national pure food law, and the sale of which does not require the payment of a United States liquor dealer's tax. * * *

"It shall be lawful for a druggist to sell grain alcohol for pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies, only to any person not a minor and who is not of intemperate habits, or addicted to the use of narcotic drugs, who shall, at the time and place of such sale, make an affidavit in writing signed by himself before such druggist, or a registered pharmacist at the time and place in the employ of such druggist, stating the quantity and the time and place and fully for what purpose and by whom such alcohol or wine is to be used; that affiant is not of intemperate habits or addicted to the use of any narcotic drug; and that such alcohol or wine is not to be used as a beverage or for any purpose other than that stated in such affidavit. Such affidavit shall be filed and preserved by such druggist and be subject to inspection at all times by any state, county or municipal officer, and a

record thereof made by such druggist in the record book mentioned in this section, showing the date of the affidavit, by whom made, the quantity of such alcohol, or wine, and when, where, for what purpose and by whom to be used. Only one sale shall be made upon such affidavit, and only in the county where the same is made and no greater quantity than is therein specified. For the purpose of this act, any druggist or registered pharmacist making such sale shall have authority to administer such oath. * * *"

Analysis of the Amendment of 1912.

The amendment of 1912, for analytical purposes, may be divided into three parts, as follows:

(1) "On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state."

We shall later endeavor to show the spirit and purpose and true interpretation of this part of the amendment.

(2) "Provided, however, that the manufacture, and sale, and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe."

It will be observed that this provision is permissive, not mandatory upon the legislature. It does operate, however, under the rules of construction—*expressio unius est exclusio alterius*—to deprive the legislature of the power to enact any law that will permit the manufacture, sale or keeping or storing for sale of intoxicating liquors as *beverages, even for personal use.* By the very terms of

this part of the amendment the legislature is only permitted to enact laws for the manufacture, sale and keeping for sale of intoxicating liquors for *medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and then only under such regulations as the legislature may prescribe.*

> (3) "The legislature shall, without delay enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

This part of the emendment is *mandatory*—not directory—upon the legislature. And laws enacted pursuant to this mandate of the constitution, when not violative of rights guaranteed under state and federal constitutions, are wholly within the province of the legislature. In other words, the legislature must enact the necessary laws to make effective the amendment-laws that will accomplish the purpose and intent of the amendment. The Supreme Court of Appeals of West Virginia, in State *v.* Sixo, (decided Nov. 30, 1915), 87 S. E., 267, at page 269, said:

> "It is the duty of the legislature to enact such laws as may be necessary to make effective this provision of the constitution as amended. * * * If the legislature has not exceeded its powers the courts cannot interfere. The courts may decide whether or not the legislature had the power to establish these regulations, but they cannot prescribe the policy, if within the legislative limits; as this would be to subordinate the will of the legislature to the opinion of the courts. * * In a well considered case of Purity Extract & Tonic Co. *v.* Lynch, 226 U. S., 192, 33 Sup. Ct. 44, 57 L. Ed. 184, Mr. Justice Hughes wrote a very able opinion and said: 'It is also well established that, when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures hav-

> ing reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transtaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government.' "

The Spirit of the Constitutional Amendment and Laws Enacted Pursuant Thereto.

It is submitted that in construing and interpreting the constitutional amendment of 1912 and the laws enacted pursuant thereto, it is necessary to consider the spirit—the very intent and purpose—of the amendment. *The people of appellee state by adoption of the amendment to the state constitution meant to discourage and prevent the consumption of alcoholic liquors as beverages on the part of her citizens and residents within her jurisdiction.* To otherwise state the intent and purpose of such amendment would be absurd and unreasonable. The amendment and laws enacted pursuant thereto express that the public policy of appellee state is the discouragement and prevention of the consumption of alcoholic beverages by her citizens. Such public policy is based upon the well recognized evil of consumption of intoxicating liquors as beverages. This well recognized evil of individual consumption of intoxicating liquors has been fully recognized and expressed by this court. It is no answer to this proposition to say that "What a man shall drink is not properly matter for legislation."

In

Crowley *v.* Christensen, 137 U. S., 86, Mr. Justice Field, speaking for the court, page 90, said:

> "It is urged that, as the liquors are used as a beverage, an injury following them, if taken in excess, is voluntarily inflicted, and is confined to the

party offending, their sales should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens, and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependant upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dramshop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as a proper subject of legislative regulation. * * *

"There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of a state or a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils."

In

Mugler *v.* Kansas, 123 U. S., 623, beginning at page 658, Mr. Justice Harlan, speaking for the court, said:

"Chief Justice Taney said 'If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it

> from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.' * * * * Mr. Justice Grier, in still more emphatic language, said: 'The true question presented by these cases, and one which I am not disposed to evade, is whether the states have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism and crime—Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of public peace, health and morals must come within this category—It is not necessary for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.' * * * * There is no justification (662) for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil."

In Eberle *v.* Mich., 232, U. S., 700, it was held by the court that liquor laws are enacted to protect the health, morals and welfare of the public and that even though such laws depreciate the value of property used in the

manufacture of liquor, that such depreciation is not the taking of property without due process of law as prohibited by the Fourteenth Amendment.

In

West Virginia *v.* Adams Express Co., (C. C. A.) 219 Fed. 794, the court said, page 796:

> "In trying to comprehend the legislative purpose in prohibition statutes, it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against sales. But it is upon the recognized evil of individual consumption as a beverage that the right of a state under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the state may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders such as deliveries by common carriers which tend to defeat or weaken its public policy of preventing the consumption of liquors as a beverage."

In

Southern Express Co. *v.* Whittle (Ala.) 69 Sou. Rep., 652 the court (page 656) said:

> "The power of the state to prohibit the manufacture or sale of intoxicatonts is never now questioned. It is generally accepted and finally established. The object and purpose of all our laws governing the subject of intoxicating liquors is 'to promote temperance and prevent drunkenness. * * * The evil to be remedied is the use of intoxicating liquors as a beverage. * * * ' Carl's Case, 87 Ala., 17, 6 South. 118, 4 L. R. A. 380; Marks *v.* State, 159 Ala., 71, 84, 85, 48 South. 864,

133 Am. St. Rep. 20. Freund, in his work on the Police Power, at section 204, thus amplifies the idea expressed in our cases above quoted;

'It is certainly the more conservative view to look upon the control of the liquor traffic as a means of protecting the community from crime and the financial burdens of pauperism; but it is also clear that the police power, resting upon this incontestable ground, is turned into a power to protect the weak individual from his own weakness, into a power to prevent the wasteful expenditure of money and time, and finally into a power to impose upon the minority the sentiments or prejudices of the majority of the community, as to what is morally right and good.'

"See Crowley *v.* Christensen, 137 U. S., 86, 90, 91, 11 Sup. Ct. 13, 34 L. Ed. 620.

"The government does not interfere with or impair 'any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society. * * * Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare.' Mugler *v.* Kansas, 123 U. S., 623, 662, 663, 8 Sup. Ct. 273, 298 (31 L. Ed. 205). Neither the fourteenth amendment, nor any other, 'was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people. * * *" Barbier *v.* Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. All personal and related rights and privileges, whether arising out of contracts or out of or pertaining to property, are subject to the lawfully exercised police power of the state, directed to the protection of the public health, the public

morals, and the public safety. N. O. Gas Co. *v* La. Light Co., 115 U. S., 650, 672, 6 Sup. Ct. 252, 29 L. Ed. 516; Mugler *v.* Kansas, 123 U. S. 623, 665, 666, 8 Sup. Ct. 273, 31 L. Ed. 205."

And in the same case, the court also said:

"The evil to be remedied is the use of intoxicating liquors as a beverage, rather than as an ingredient of medicines and articles of toilet or for culinary purposes and the object of the law in this particular instance must not be lost sight of in its interpretation."

Ex Parte Crane (Idaho) 151 Pac., 1006, the court said, page 1010:

"Still it must be admitted that, if the possession of such liquor 'can by no possibility injure or affect the health, morals, or safety of the public,' the sale is equally harmless; for it only transfers the possession from one person to another. The fact is that the harm consists neither in the possession nor sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the legislature, are trying to eradicate, and since 'it will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because of necessity no one can drink that which he has not in his possession.' "

In

State *vs.* Phillips, (Miss.) 67 Sou. Rep., 651, the court said:

"If the object of the prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale. Of course the typical public saloon is demoralizing, but there would be no practical difficulties in the way of so regulating the saloon as to minimize

> all of the evils which flow from the saloon, except the evils which flow from the drinking of intoxicating beverages. If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is bridged step by step, and when the preponderate and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end."

We submit that it would be a vain thing, an absurd thing, for the sovereign state of West Virginia to prohibit by her constitution and statutes the manufacture and sale of intoxicating liquors within her limits unless the purpose thereof is to discourage and prevent consumption of such liquors as beverages by her citizens. If consumption of such liquors as beverages is *not* to be discouraged and prevented, why prohibit the manufacture and sale of such liquors? And, is it not better and more practical to prohibit, in express terms, the manufacture and sale, rather than, in express terms, to prohibit the consumption? If the purpose and intent of the prohibitory provisions are accomplished, how can there be consumption of alcoholic liquors as beverages? In contrast with this, however, how can the *consumption* of intoxicating liquors as beverages be discouraged or prevented if the manufacture and sale and keeping for sale thereof within the states limits are *permitted?* It is obvious that there is but one practical way to prevent and discourage consumption of intoxicating liquors as beverages; and that, is to go to the very root of the evil and prohibit the manufacture and sale and keeping and storing for sale of such liquors within the territorial limits of the state.

We submit, that the foregoing authorities convincingly

and fully sustain the statement as to the spirit—the purpose—of the amendment and the laws enacted pursuant thereto, and the proposition that such constitutional and statutory provisions are based upon the well recognized evil of individual consumption of intoxicating liquors.

If a state has the right to prohibit the manufacture of intoxicating liquors for one's own use, and the right to prohibit the sale thereof to a citizen for his own use, it must also, upon the same grounds and for the same reason, have the right to prohibit the introduction into the state of such intoxicanting liquors if the protection of the federal constitution be by Congress withdrawn from such shipments. It was well said by Chief Justice Marshall, in Brown *v.* Meredith, 12 Wheaton, 420, "*There is no difference in the effect between the power to prohibit the sale of an article and the power to prohibit its introduction into the country, the one would be the necessary sequence of the other.*" (Italic ours)

Relying upon the foregoing construction and interpretation of the prohibition amendment of 1912, and the statutes enacted in pursuance thereof, as the true construction and interpretation of such amendment and laws, we now come direct to the assignment or error under consideration.

PLACE OF DELIVERY PLACE OF SALE.

Section 3 of the Yost law, hereinbefore set out, prohibits the manufacture, sale, keeping, storing, offering or exposing for sale intoxicating liquors. Said section also provides:

> "And in case of a sale in which a shipment or delivery of such liquor is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe."

The same question, arising under this assignment of error, arose in equity cause of State of West Virginia *vs.* Adams Express Co. Said cause was instituted in the Circuit Court of Kanawha county, removed by the defendant to the United States District Court, and heard upon appeal by the United States Circuit Court of Appeals for the Fourth Circuit, upon appeal prosecuted by the state. The reported opinion of the Circuit Court of Appeals appears in 219 Fed., 794. We cannot better state the proposition, nor can we present stronger argument in support of appellee's contention than to quote from the opinion of the Circuit Court of Appeals at pages 796, 799, 219 Fed. Rep.

> "1. In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a state under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the state may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquors as a beverage.
>
> "We are not concerned in this case with the question whether the state legislature or the state legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another state and bring them into the state of West Virginia for his own consumption; but with the very different question whether the state may forbid the sale of liquor in its bor-

ders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the state by the common carrier of liquor so to be delivered contrary to the law of the state. We think it can be demonstrated that this question must be answered in the affirmative—that it can be made perfectly manifest that shipments into the state and deliveries by common carriers, by which liquor dealers outside of prohibition states were enabled to thwart the efforts of state governments to save the people of the state from the liquor evil, have been forbidden by state legislation made valid by the wothdrawal of the protection of inetrstate commerce from such shipmets under the act of Congress known as the Webb-Kenyon Act.

"The amendment to the Constitution of the state of West Virginia, known as article 6, Sec. 46, ratified in November, 1912, prohibits 'the manufacture and sale and keeping for sale' of intoxicating liquors with exceptions not material here; and it provides that:

'The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section.'

"On February 11, 1913, the Legislature enacted a statute to take effect July 1, 1914, which in section three contained this provision:

"Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors or absinthe, or any liquors compounded with absinthe, he shall be deemed guilty of a misdemeanor * * *; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling,

keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe. Laws 1913, c. 13 (Code 1913, c. 32a, sec. 3 [sec. 1282]).

"2. At the argument it seemed to be conceded that state legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the state legislative power. The power of the state to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in Sinnot *v.* Davenport, 63 U. S. (22 How.) 227, 16 L. Ed. 243, Delamater *v.* South Dakota, 205 U. S., 93, 27 Sup. Ct., 447, 51 L. Ed., 724, 10 Ann. Cas., 733, and innumerable other federal and state decisions.

'The internal commerce of a state—that is, the commerce that is wholly confined within its limits —is as much under its control as foreign or interstate commerce is under the control of the federal government.' Sands *vs.* Manistee River Improvement Co., 123 U. S. 288, 8 Sup. Ct. 113, 31 L. Ed. 149; Hart *v.* State, 87 Miss. 171, 39 South. 523, 112 Am. St. Rep. 437.'

"This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in State *v.* Herring, 145 N. C.

418, 58 S. E. 1007, 122 Am. St. Rep., 461, and State *v.* Patterson, 134 N. C. 612, 47 S. E. 808.

"3. There is nothing in the amendment of the state Constitution that takes away by implication this power of the Legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits 'the manufacture, sale and keeping for sale' of liquors. But it does not indicate a purpose to deprive the Legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquors, had in view the general common law rule that the sale was to be considered made out of the state on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the state as a permanent state policy, that by no means implies an intention to take from the legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time to time as circumstances might require, but not considered proper to be imbedded in the Constitution as the permanent law of the state. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in State *v.* Hooker, 22 Okl. 712, 98 Pac. 964.

"4. The point is earnestly pressed that, even if it be true that under the statute in West Virginia delivery in any county of the state is a sale in that county, yet, under an exception of the statute, the express company has the right to promote illicit sales by daily carrying liquor to be delivered in the state in violation of its laws. The section of the statute above quoted does exempt a common carrier from the provision that any person 'who shall act as the agent or employee of such manufacturer, or such seller or person so keeping, storing, offering or exposing for sale liquors shall be deemed guilty of such manufacturing or selling, keeping, storing or exposing for

sale as the case may be', and shall be punished as provided by this section. This exemption of the common carrier from punishment by fine and imprisonment for the carriage or storing of liquor cannot by any stretch be held to imply consent by the state that the carrier may engage in the business of promoting the liquor traffic by conveying it to the place of sale. For such action the carrier by reason of the difficulties of its position may well be exempted, as in this instance, from punishment as a criminal the same as if it were a principal in the crime of keeping or selling." * * * * * * * * * * * * * *

"5. The requirement relied on by the express company that common carriers shall keep books showing the name of the consignee, etc., may better be regarded as a means of gaining information upon which to seek relief against the transportation and delivery by carriers of contraband liquor as distinguished from that to be legitimately used under the exceptions set out in the statute, than as a consent that they should transport and deliver contraband liquor."

In

Atkinson *v.* Southern Express Co., 94 S. C. 444,

"The state may pass a statute forbidding the importation of intoxicating liquor into this territory for personal use since the passage by Congress of the Webb-Kenyon Act, which prohibits the transportation into any state of any intoxicating liquors, intended to be received, possessed, sold or in any manner used in violation of any law of such state."

In State *v.* Cardwell (N. C.) 81 S. E., 630, Chief Justice Clark wrote a concurring opinion. Chief Justice Clark's opinion, we submit, must have particular weight with the Court in determining the case at bar for the reason to be hereinafter stated. In the concurring opinion of Chief Justice Clark (81 S. E. 630) he says, in part:

"CLARK, C. J. Concurs in the result and in the opinion, but not in the obiter that if the liquor had been shipped in from Danville, Va., the defendant could not have been convicted, citing State *v.* Whisenant, 149 N. C. 515, 63 S. E. 91, and State *v.* Allen, 161 N. C. 226, 75 S. E. 1082, for the reason that those cases were written before the passage of the Webb-Kenyon law, which was enacted for the very purpose of taking away the defense, on which those decisions were based that inter-state shipments of liquor were protected from the enforcement of a state statute. Rev. Sec. 2080, makes the place of delivery of intoxicating liquors the place of sale. This act was sustained in State *v.* Patterson, 134 N. C. 612, 47 S. E. 808, which has been repeatedly cited since with approval. But in State *v.* Whisenant and State *v.* Allen, supra, it was held that where the liquor had been shipped in from another state the decision in State *v.* Patterson, supra, and Rev. Sec. 2080, would not apply. It was to cure this defect that the Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699) was passed, which is entitled 'An act divesting intoxicating liquors of their interstate character in certain cases.' This act provides that the shipment of intoxicating liquors into any state or territory in which said spirituous or intoxicating liquor 'is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, * * * is hereby prohibited.'

"The shipment of intoxicating liquors from another state into this state being thus deprived by act of Congress of its interstate character, it follows that when the liquor, if it came from Danville, Va., reached Reidsville, our laws applied to it as fully in every respect as if it had been shipped in from another point in this state, and the decision in State *v.* Patterson would fully apply. The Wilson Act (Act. Aug. 8, 1890, c. 728, 26 Stat. 313

[U. S. Comp. St. 1901, p. 3177] had provided that when whiskey was shipped into a state or a district in which the sale of intoxicating liquors was forbidden that it should be 'subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory.' The United States Supreme Court, however, in Rhodes *v.* Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, and in Wilkerson *v.* Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, construed the word 'arrival' in the Wilson act to mean the actual delivery of the liquor to the consignee, and hence that it was exempt till then from being subject to the state law forbidding the sale of intoxicating liquors. In this latter case, however, Chief Justice Fuller, speaking for the court, says: 'No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do.' Upon this hint, Congress acted by passing the Webb-Kenyon law which does so divest intoxicating liquors of their interstate character at the earliest period of time, that is, upon their delivery to the carrier. In the same case Chief Justice Fuller further says: 'Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part.' Congress in the Webb-Kenyon law acted upon this hint also and provided for the application of that statute to intoxicating liquor 'which is intended by any one interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of this State.' * * * * * * * * * *

"It has been contended that Congress could not regulate an article of interstate commerce by prohibiting its shipment altogether in certain cases. But the contrary has been uniformly held and as to many articles. In Champion *v.* Ames, 188 U. S., 321, 23 Sup. Ct. 321, 47 L. Ed. 492, Justice Harlan said that lottery tockets had always been legitimate subjects of commerce, but that Congress possessed the power under the commerce clause to prohibit altogether their transportation between state and state. The opinion is clear and able, and its reasoning applies as fully to intoxicating liquors as to lottery tickets. What subjects shall thus be prohibited as articles of interstate commerce rest in the discretion of the law-making department of the government and is not subject to review by the courts.

"In Hoke *v.* U. S. 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913 E, 905, the court held that the power of Congress over interstate commerce is direct, without limitations, and far-reaching, and includes the transportation of persons as well as property, and therefore held valid the statute of June 25, 1910 (Act June 25, 1910, c. 395, 36 Stat. 825, [U. S. Comp. St. Supp. 1911, p. 1343]) prohibiting the white slave traffic. In that case it was held that the regulative power of Congress extends to the absolute prohibition or transportation in transit both in interstate and foreign commerce, citing the lottery ticket case (188 U. S. 321, 23 Sup. Ct., 321, 47 L. Ed. 492) above referred to, the pure food case (Egg Co. *v.* U. S., 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364) and other cases. This decision has been reaffirmed by that court in Wilson *v.* U. S. 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed.—, opinion by Justice Pitney, February 24, 1914. These opinions are conclusive of the power of Congress to regulate interstate shipments of intoxicating liquor into prohibition territory by prohibiting them altogether."

It will be observed Chief Justice Clark in the concensus opinion says:

> "The shipment of intoxicating liquors from another state into this state being thus deprived by act of Congress of its interstate character, it follows that when the liquor, if it came from Danville, Va., reached Reidville, our laws applied to it as fully in every respect as if it had been shipped in from another point in this state, and the decision in State *v.* Patterson would fully apply."

It will be further observed that the decision in State *v.* Patterson, (N. C.) 47 S. E. 808, upheld the statute which made the place of delivery of intoxicating liquors the place of sale.

We submit that Judge Clark's interpretation of the Webb-Kenyon act, as expressed in the concurring opinion referred to, is largely controlling in the case at bar. We so submit for the reason that the Supreme Court of Appeals of West Virginia, in State *v.* Davis (decided Nov. 30, 1915) —— West Va., 87 S. E. Rep. 262, (Advance sheet No. 3, Jan. 8, 1916) substantially adopts Judge Clark's interpretation of the Webb-Kenyon act. True the Supreme Court of West Virginia in the Davis case did not have directly under consideration the provision of section 3 of the Yost law under consideration at this point. But the Court did have under consideration section 8 of said law. The two sections are very closely related, and each has for its purpose the making effective of the amendment of 1912. *In spirit the two sections are alike and so closely related that the Court found it necessary to refer to both in passing upon one.*

In State *v.* Davis, at page 266, the Court says:

> "We think Judge Clark's interpretation of the Webb-Kenyon Act, though thought by the majority not to be involved in that case, has substan-

tial foundation in the history of the federal legislation referred to. The Webb-Kenyon Act, in terms, is limited to the shipment or transportation of intoxicating liquors, and to liquors intended by any person interested therein to be received, possessed, sold or in any manner used either in the original package or otherwise, in violation of the state statute. To bring sections 3 and 8, of the Yost Law, under this federal statute, and within the principles of the Delamater and other cases the things prohibited must be found accessory to or in some way incidental to the business of transporting liquors from one state or territory to another. The Yost Law undertakes to make the place of delivery within the state the place of sale. Wherefore, regardless of the rule of the common law, an outside dealer undertaking to effect a sale within the state by the use of the United States mails, would, if the statute be valid, be making a sale within the state in violation of the statute, whether such liquors were intended for the personal use of the purchaser or not.

"A statute prohibiting soliciting of orders by means of such circulars or other advertisements, the offence of which defendant was found guilty, is certainly within the spirit and policy of the statute to prohibit the sale and manufacture of intoxicating liquors. And the carrying of such liquors into the state by a common carrier would be in furtherance of the unlawful purposes of those violating the statute."

"Again, if orders should be obtained by means of circulars, or other advertisements inhibited by the statute, and result in a sale and delivery of liquors within the state, such sale would be a violation of the statute and be covered by the Webb-Kenyon statute.

So we conclude, in view of the interpretation of the Wilson Act, that this latest federal statute supplementing that act has so far removed restrictions upon state action as to validate the provis-

> ions of the Yost Law in question, and that defendant is guilty as charged."

The cases of Southern Express Co. *v. Bell,* (Ala.) 69 Sou. Rep. 652, and Glenn *v.* Southern Express Co. (N. C.) 87 S. E. Rep. 136, Advance Sheet No. 2, January 1, 1916, in principle and by analogy sustain the position contended for by the state in the assignment of error under consideration.

Appellant relies upon such cases as Adams Express Company *v.* Kentucky, 206 U. S., 129, Vance *v.* Vandercock, 170 U. S., 439, in Re Rahrer 140 U. S., 545, and Rhodes *v.* Iowa, 170 U. S., 412. These decisions were all announced before the enactment of the Webb-Kenyon law. We submit that the language of Mr. Justice White, in the Delamater case, 205 U. S., 93, particularly were the words "and Webb-Kenyon law," made addenda thereto, apropos to the cases so relied upon.

> "For this reason we at once put out of view decisions of this court, which are referred to in the argument and which are noted in the margin, because they concerned only the power of a state to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law."

Legislature Had in Mind Interstate Shipments.

Appellant will probably contend that the legislature did not have in mind interstate shipments, when the Yost law was enacted. We submit that this contention is not tenable. The legislature did not presume that the manufacture, sale and shipment of intoxicating liquors, in intrastate business, would seriously menace the health and morals, or disturb the peace of the people, in a state wherein the manufacture and sale of such liquors were prohibited by the constitution and statutes

of the state. Those who engage in selling such liquors, in such a state, endeavor to avoid intrastate shipments by a common carrier; other and less public means and methods are resorted to by such persons engaged in such business. Again, since intoxicating liquors could neither be manufactured nor kept for sale in a state, the legislature did not presume—could not well presume—that shipments thereof would be *intra-state*. On the other hand the legislative presumption was, necessarily, that the shipments would come, and must so come, if shipments were made from without the state—*inter-state*—and the legislative purpose, therefore, was to protect the people of the state from such interstate shipments, and to give force and effect to the public policy of the state as expressed and reflected in her organic and statutory laws.

The Supreme Court of North Carolina well expressed the purpose of such legislation in Glenn *v.* Express Co., 87 S. E. 136, (Vol. 2, January 1, 1916), beginning at the bottom of page 141 and concluding at top of page 142, by saying:

> "If considered without regard to the policy of the state in favor of prohibition, we would hold it an arbitrary and unwarranted interference with the right of the carrier to transport, and with the right of the consignee to receive; but when it is understood that the statute is but a means of enforcing the state policy of prohibition there seems to be such a resonable relation between the two as justifies upholding the statute as a reasonable regulation. The state has declared that intoxicating liquors shall not be sold or manufactured within the state, and one of the principal difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the state for use and those introduced to sell, and the bringing in of such liquors under the pretense of being for personal use, when they are intended for sale, has been such a prolific source of

> evasion of the prohibition law that restrictions upon the right of delivery in the state are necessary to prevent illicit sales."

In Purity Extract Co. *v.* Lynch, 226 U. S. 192, Mr. Justice Hughes, speaking for the court, said:

> "It is also well established that, when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government."

In State *v.* Davis, ——— West Va., ———, 87 S. E., 262, (Vol. 3, January 8, 1916) it appears that Davis, a duly licensed liquor dealer, doing business at Oakland in the state of Maryland, through the agency of the United States mails, solicited of a person residing at Clarksburg in Harrison county, West Virginia, an order for intoxicating liquors for the latter's personal use; the letter soliciting the order was deposited by Davis in the post office at Oakland, Maryland, and received by the person solicited at Clarksburg, West Virginia. The arguments made for Davis, in principle, covered most, if not all of the arguments for appellant in this case. The Supreme Court of West Virginia interpreted the provisions of the Yost law under consideration by it as applying to interstate transactions and to liquors intended for personal use, and sustained such provision as valid under both state and federal constitutions.

Personal Use.

Appellant will probably contend that the state legislature did not intend the provisions of section 3 of the Yost law to apply to sales and shipments of intoxicating liquors, when the same are intended for personal use of the consignee. To maintain such contention would require reading into the statute a qualifying clause that is not contained in the statute.

We reiterate, in a word, what has already been said in this brief, namely, that the very purpose of the amendment of 1912, and laws enacted pursuant thereto, was to discourage and prevent the consumption of intoxicating liquors as beverages. And we further submit that such intent, such purpose of the amendment and the laws enacted pursuant thereto, has been declared by the court of last resort of appellee state. Recurring again to State *v.* Davis, supra, it will be observed that the court said:

> "Wherefore, regardless of the rule of the common law, an outside dealer undertaking to effect a sale within the state by the use of the United States mails, would, if the statute be valid, be making a sale within the state in violation of the statute, *whether such liquors were intended for the personal use of the purchaser or not.*" (The italics are ours.)

It will thus be seen that the Supreme Court of appellee state has declared that the law applies to liquors brought into the state although such liquors were intended for personal use. And the court, in connection with part of the opinion just quoted, further says:

> "A statute prohibiting soliciting of orders by means of such circulars or other advertisements, the offense of which defendant was found guilty, *is certainly within the spirit and policy of the statute to prohibit the sale and manufacture of intoxicating liquors, and the carrying of such liquors*

> *into the state by a common carrier would be in furtherance of the unlawful purpose of those violating the statute. Again, if orders should be obtained by means of circulars, or other advertisements inhibited by the statute, and result in a sale and delivery of liquors within the state, such sale will be a violation of the statute and be covered by the Webb-Kenyon statute.* (The italics are ours.)

We submit that the court of last resort of appellee state having considered the statute interpreted by it as applicable to inter-state shipments and to intoxicating liquors when intended for personal use, although an inter-state transaction, that the meaning of the statute therefore is no longer open to question. And the court having further considered that the statute, so interpreted, violates no rights of the citizen under the state Constitution, that the Constitutionality of the statute, under the state Constitution, is no longer open to question. And the court further considered that the statute, so interpreted, violates no rights of the citizen under the Federal Constitution, nor any of the amendments thereof.

SECOND.

Second Assignment of Error.

The second error assigned by counsel for appellant is stated as follows:

> "In construing the constitution and law of West Virginia as prohibiting a liquor dealer in anothed state from advertising by letters, mailed to citizens of West Virginia, the sale of liquors in such other state, to be delivered in pursuance of such sales to consignees in West Virginia."

In the intervening petition of appellee state it is charged that the appellant on, and since the first day of July,

1914, has, by printed or written circular letters, order blanks and price lists, solicited citizens of said state, particularly citizens residing in the Sixteenth Judicial Circuit thereof, to give appellant, the James Clark Distilling Company, orders for intoxicating liquors. That the purpose of such letters, order blanks, etc., was to procure from the citizens of said state, particularly those residing in said Sixteenth Judicial Circuit, orders for intoxicating liquors to be filled by the appellant, and that the appellant intended to accept such orders and ship such intoxicating liquors to such citizens aforesaid by the defendant, the American Express Company, R. pp. 12-13.

It is established by the admission of John Keating, president and treasurer of appellant, a witness introduced by the appellant, that the appellant, on and since the first of July, 1914, sent circulars and order blanks into West Virginia, soliciting from the citizens thereof orders for intoxicating liquors kept for sale by the appellant. R. pp. 29-31.

Our first answer to appellant's second assignment of error is this:

> (1) The Yost law prohibits any person, resident or non-resident, soliciting within the state orders for intoxicating liquors. This is valid, although such orders may only contemplate a contract resulting from final acceptance in another state. Soliciting of orders is part of the sale. A sale is forbidden, so is any constituent or accessory part thereof forbidden.

Section 3 of the Yost Act, hereinbefore quoted to a large extent, expressly provides:

> "Except as hereinafter provided, if any person acting for himself, or by, for or through another, shall manufacture or sell, or keep, store, offer or expose for sale, or solicit or receive orders for any liquors or absinthe, or any drink compounded with

> absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be confined." etc. First offense, a misdemeanor; second offense, a felony.

However, it may be contended for the appellant that under the Interstate Commerce clause of the Federal Constitution, the provisions of the Yost law relative to soliciting orders cannot be applied to the non-resident dealer—that the non-resident dealer is not affected by the laws of West Virginia, as to intoxicating liquors situate at his place of business, when the dealer intends to fill the order he receives, at his place of business in response to his solicitation sent from his place of business. This has always been the contention of the outside liquor dealers, and, frankly, the contention is supported by a long line of authorities; but that line of authorities is broken. The effect of that line has been modified by the Wilson Act and the Webb-Kenyon Act. Our answer is fully sustained by Delamater *v.* South Dakota, 205 U. S., 93.

Our second answer to appellant's second assignment of error is this:

(2) While there is no Federal law that forbids the use of the mails to a non-resident liquor dealer to solicit orders for intoxicating liquors or advertise the same by circular, order blanks and price list, it is, however, most respectfully submitted that,

> *the soliciting of orders for intoxicating liquors can be done by letters, price lists and order blanks, the same as though the dealer solicited in person.*

True, appellant used the mails to send letters, price lists and order blanks to citizens of West Virginia. It was not contended in the court below, and it is not contended here, that such use of the mails violated the laws

of West Virginia. The legislature of West Virginia could not declare such use of the mails to be unlawful. Congress alone can say what shall not be mailable.

Let us suppose appellant delivered in person the soliciting letters. Will any one say it had not solicited in violation of the state's law? What distinction is there between personally delivering the letters and sending them by a *servant*—the postoffice—of the writer? In U. S. *vs.* Thayer, 209 U. S. 39, the Court said:

> "If the writer of the letter in person had handed it to the man addressed, in the building, without a word, and the latter had read it then and there, we suppose that no one would deny that the writer fell within the statute. We can see no distinction between personally delivering the letter and sending it by a servant of the writer."

In Zinn *v.* State, (Ark.) 114, S. W., 227, it was held that a statute making it unlawful to solicit orders for intoxicating liquors in prohibition territory through agents, circulars or newspaper advertisements is a valid exercise of the state's police power, and it was expressly held in such case that

> "A statute making it unlawful to solicit orders for intoxicating liquors in prohibition territory, through circulars, is not unconstitutional as infringing the power of Congress, under U. S. Const., Art. 1, Sec. 8, to establish postoffices and designate what shall be excluded from the mails."

In Hayner *v.* State, 83 Ohio St. Rep., 178, it was expressly held that a solicitation for intoxicating liquors may be made by letter as well as in person. Hayner was indicted and convicted for soliciting orders for intoxicating liquors. It was shown that he solicited the order by letter sent through the United States mails. The conviction was upheld by the court of last resort of Ohio, the Court holding that the Hayner letter, while mail-

able, so far as the laws governing the mails were concerned, was a solicitation

same as though he had solicited in person,

and that a statute, making it unlawful to solicit orders for intoxicating liquors in prohibition territory, through agents, circulars, posters, letters, etc., is not unconstitual as infringing the powers of Congress relating to what shall be excluded from the mails.

In Rose *v.* State, (Ga.) 62 S. E., 117, the Intermediate Court furnishes a very able discussion of the proposition here involved. True, the Georgia Supreme Court, 133 Ga. 353, 65 S. E., 770, 36 L. R. A. (N. S.) 443, reversed the Intermediate Appeal Court. The opinion of the Georgia Supreme Court was handed down October 1, 1909, before enactment of the Webb-Kenyon Act. The reasoning of the Georgia Supreme Court, for the reversal, in substance, was, that the Tennessee dealer, under the Interstate Commerce clause, engaged in selling intoxicating liquors, was handling an article that was legitimate interstate commerce, not subject to any restriction by the state. The Court, in the opinion, said:

> "To hold that a person had a right to make an interstate sale, but that the state to which the liquor was to be sent could prohibit him from using the interstate mails for the purpose, would certainly greatly curtail the right to do such business."

It is apparent from the opinion of the Georgia Supreme Court that it reversed the Intermediate Appellate Court upon the ground that intoxicating liquors were unqualifiedly legitimate interstate commerce. Since the enactment of the Webb-Kenyon Act such is no longer true. Now, intoxicating liquors are divested of their interstate character when the shipment or transportation thereof into a state, to be there received, possessed,

sold or in any manner used by any person interested therein, is in violation of the law of the state.

A very clear and, we submit, determinative ruling of the Supreme Court of the United States, is found in

U. S. *v.* Thayer, *supra.*

Thayer, by letter, solicited funds for campaign purposes in violation of the Civil Service Act. The Court held that the solicitation was not complete until the letter was delivered to the person from whom the contribution was solicited. Such, in principle, is the proposition we are urging here. It was no offense for plaintiff to deposit its letters in the mails. It was no solicitation of the citizens of West Virginia to buy liquors from appellant until its letters were delivered to the person from whom the orders were solicited. The postoffice then had nothing more to do with the letters. The postoffice was a mere, innocent, inanimate agency that carried the soliciting letters. So long as the letters remained in the custody of the postal authorities, there were no solicitations—no offenses committed by appellant. The offense arose after the letters were delivered by the postal authorities and in the hands of the persons solicited to give orders or in the hands of such persons as advertisements of appellant's business.

Mr. Justice Holmes, speaking for the Court, in the Thayer case, pp. 42-3, said:

> "Of course it is possible to solicit by letter as well as in person. It is equally clear that the person who writes the letter and intentionally puts it in the way of delivery solicits, whether the delivery is accomplished by agents of the writer, by agents of the person addressed, or by independent middlemen, if it takes place in the intended way. It appears to us no more open to doubt that the statute prohibits solicitation by written as well as by spoken words. * * * If the writer of the letter in person had handed it to the man address-

> ed, in the building without a word and the latter had read it then and and there, we suppose that no one would deny that the writer fell within the statute. We can see no distinction between personally delivering the letter and sending it by a servant of the writer.
>
> "The solicitation was made at some time, some where. The time determines the place. It was not complete when the letter was dropped into the post. If the letter had miscarried or had been burned, the defendant would not have accomplished a solicitation."

Of like holding is the case of

In Re Palliser, 136 U. S., 257.

It is no answer to say that in the Thayer case it was an offense anywhere in the United States for one to solicit campaign contributions in a public building, for the reason that, as stated by the Supreme Court in both of the cases just cited, *that one may solicit by letter as well as in person*, and particularly because the Court says that if the letter had never reached the person to whom addressed, there was no solicitation, the Court saying:

> "If the letter had miscarried or been burned, the defendant would not have accomplished the solicitation."

Let us further illustrate the proposition. The addressee received from appellant, through the United States mails, a letter soliciting an order for intoxicating liquors. He received such letter in West Virginia. The postal authorities, after delivery no longer had control of the letter. The addressee could do as he pleased with it. Suppose he had destroyed it without reading or otherwise learning its contents. *No solicitation, no offense.* But he did *not* destroy the letter. He learned its contents—he had been solicited in West Virginia—an offense was committed in West Virginia, *after delivery of the letter by the postoffice.*

It may be said, however, that such holding would interfere with the use of the mails. Not at all. Had appellant's personal representative come into the state in person and solicited, and been apprehended, could it be said that he had committed no offense, because to so hold would be interfering with interstate commerce?

We submit the principle contended for here is further supported by the case of

State *v.* Morrow, (S. C.) 18 S. E., 853.

Morrow sent by mail from Washington, D. C., to a woman in South Carolina certain pills to be used for certain purposes. He suggested, by letter the use of the pills to cause abortion. To suggest abortion, or aid the same, was an offense by the statute of South Carolina. The pills were received, the advice of Morrow acted upon, resulting in connection with other things, in the death of the woman. Morrow was indicted and convicted in South Carolina for a statutory offense. The offense was not committed by mailing the pills. For some purposes they might have been lawful.

The Supreme Court of South Carolina, in the opinion, said:

> "Upon the same principle, it seems to us that when the defendant procured the pills in Washington, and put them in the mail to be delivered to Colie Fowler in Columbia, for the unlawful purpose charged, it was, in contemplation of law, the same thing as if he had there delivered the pills to the woman for whom they were intended, in his own proper person. Instead of coming in person to Columbia to deliver the pills, he simply employed the agency of the mail to do the act which he desired to have done, and which was done by his express authority and direction in this state."

The Court held that it was immaterial that the of-

fense charged was a statutory offense independently of common law offense.

The Circuit Court of Appeals for the Fourth Circuit, in the State of West Virginia *vs.* Adams Express Co., 219 Fed., at pages 799 and 800, said:

> "6. The right of the state to an injunction against the persistent transportation by the express company of liquor to be delivered in West Virginia, in pursuance of a contract of sale made in another state, is reinforced by the fact that the express company has transported the liquor which Clendenin was induced to order from Beigel by solicitation through circulars and price lists, expressly forbidden and made criminal by section 8 of the statute, and that the express company intends to continue to transport and deliver for Beigel to purchasers in West Virginia liquors which he has contracted to sell, and intends to deliver through the express company, on orders obtained by solicitation forbidden by the statute. But as we have endeavored to show the relief of injunction is not dependent on this consideration.
>
> "7. It makes no difference that the United States mail was used for the solicitation. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetuate a murder by poison, or to solicit contribution of office holders in violation of the civil service law, or to obtain goods under false pretenses. In re Palliser, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514; United States *v.* Thayer, 209 U. S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673; Hayner *v.* State, 83 Ohio St. 178, 93 N. E. 900; State *v.* Morrow, 40 S. C. 221, 18 S. E. 853."

In Advertiser Co. *v.* State etc., (Ala.) 69 Sou. Rep., p.

501, a statute of like nature to the one under considera tion here, although not in like terms, was sustained by the court of last resort of Alabama.

Finally, conclusive as to the interpretation of the statutes under consideration, and conclusive as to the rights guaranteed to a citizen of the state under the state constitution, is the case of State *v.* Davis, *supra.* The same statute and the same questions now under consideration here, were considered and passed upon by the court of last resort of appellee state in the case of State *v.* Davis, *supra.* The statute was interpreted as applying to interstate transactions and as to intoxicating liquors intended for personal use; and the statute was sustained and held to be constitutional under both state and federal constitutions. The syllabus of the case is as follows:

> "A liquor dealer residing and doing business in another state, who, by the agency of the United States mails, sends into this state unsolicited and here circulates or distributes to prospective customers price lists, circulars and order blanks, advertising his liquors for sale and which he proposes to ship into this state to them, and which advertising matter by such agency is actually delivered to a citizen of this state, is guilty of a violation of section 8, chapter 13, Acts of the Legislature of 1913, known as the Yost law (Code 1913, c. 32A, Sec. 8 [sec. 1287],) and may be here indicted and punished as provided by said act.
>
> "So construed, said act, by virtue of the acts of Congress known as the Wilson Act (Act. Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1913, sec. 8738]), and the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. Sec. 8739]), does not infringe the commerce clause of section 8 of article 1 of the federal constitution.
>
> "Nor does the provision of section 8 of said act of 1913, so construed and applied, violate the 'privileges and immunities' clause of the Fourteenth Amendment to the federal constitution.

THIRD.

Carrier Would Be Public Nuisance.

Sections 14 and 17 of the Yost law are as follows:

"Sec. 14. All houses, boat houses, buildings, club rooms and places of every description, including drug stores, where intoxicating liquors are manufactured, stored, sold or vended, given away, or furnished contrary to law (including those in which clubs, orders or associations sell, barter, give away, distribute or dispense intoxicating liquors to their members, by any means or device whatever as provided in section six of this act) shall be held, taken and deemed common and public nuisances. And any person who shall maintain, or shall aid or abet, or knowingly be associated with others in maintaining such common and public nuisance, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months for each offense, and judgment shall be given that such house, building or other place, or any room therein, be abated or closed up as a place for the sale or keeping of such liquors contrary to law, as the court may determine.

"Sec. 17. The commissioner, his agents and deputies, and the attorney general, prosecuting attorney, or any citizen of the county where such a nuisance as is defined in section fourteen of this act exists, or is kept or maintained, may maintain a suit in equity in the name of the state to abate and perpetually enjoin the same, and courts of equity shall have jurisdiction thereof. The injunction shall be granted at the commencement of the action and no bond shall be required.

"It shall not be necessary for the court to find that the premises involved were being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the bill

are true, the court shall order that no liquors shall be sold, bartered, given away, distributed, dispensed or stored in such house, building, boat house, club room or other place, nor in any part thereof for a period of not to exceed one year in the discretion of the court from and after such finding in case of a drug store; in other cases the order for abatement shall be perpetual,

"Any person violating the terms of any injunction granted in proceedings hereunder shall be punished for contempt summarily by the court without the impanelling of any jury to try the same, by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months, in the discretion of the court or judge thereof in vacation. In case decree is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court entering the same shall also enter decree for a reasonable attorney's fee in such action in favor of the plaintiff against the defendants therein, which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney, or attorneys of the plaintiff therein."

It is submitted that any common carrier, such as appellant, would constitute itself a public nuisance, subject to injunction and abatement, if it carries, indiscriminately, intoxicating liquors into the state. State *v.* U. S. Express Co. (Ia.) 145 N. W., 451; Southern Express Co.*v.* State (Ala.), 66 So., 115. The proposition is so well stated in the opinion of the Circuit Court of Appeals in State of West Virginia *v.* Adams Express Co., 219 Fed., at page 798, in paragraph 4, already hereinbefore quoted, that we refer to the paragraph and adopt it as part of this brief.

The Supreme Court of Appeals of West Virginia, in

State *v.* Davis, *supra,* S. E. Rep. (Vol. 87-3 page 266) well stated the proposition:

> "A statute prohibiting soliciting of orders by means of such circulars or other advertisements, the offense of which defendant was found guilty, is certainly within the spirit and policy of the statute to prohibit the sale and manufacture of intoxicating liquors. And the carrying of such liquors into the state by a common carrier would be in furtherance of the unlawful purpose of those violating the statute.
>
> "Again, if orders should be obtained by means of circulars or other advertisements inhibited by the statute, and result in the sale and delivery of liquors within the state, such sale would be a violation of the statute and be covered by the Webb-Kenyon statute.

FOURTH.

Subsequent Legislation—Act, Regular Session 1915, and Act Second Extraordinary Session.

Without the slightest concession to appellant's contention that sections 3 and 8 of the Yost law were not intended to apply, and do not apply to interstate shipments and solicitations for intoxicating liquors for personal use, we submit such contentions are now moot questions of construction.

At the regular biennial session of the West Virginia legislature, session 1915, section 7 of the original Yost law was amended. The original section reads as follows:

> "The keeping or giving away o f intoxicating liquors, or any shifts or devices whatever, to evade the provisions of this act, shall be deemed an unlawful selling within the provisions of this act."

By act of the regular session of 1915, passed the 29th day of January, 1915, approved February 5, 1915, and

in effect thirty days from passage, now chapter 7, page 34 et seq., Acts 1915 of the West Virginia legislature, original section 7 was amended so as to read as follows:

"It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by sections four and twenty-four) fruit stands, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; *provided, however,* that nothing contained in this section shall prevent one in his home from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but the word "home" as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, *provided, further,* that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections four and twenty-four; and *provided, further, however,* that in case of search and seizure, the finding of any liquors shall be *prima facie* evidence that the

same are being kept and stored for unlawful purposes."

Among other provisions of the amended Section 7 is this:

> "And, *provided, further*, that no common carrier, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections 4 and 24."

At the second extraordinary session of the West Virginia legislature, by an act passed May 24, 1915, approved May 29, 1915, and in effect ninety days from passage, there was added to the original Yost law an additional section numbered 34. Such section is chapter seven, Acts of said extraordinary session, and appears at page 660 "Acts of West Virginia Regular, Extraordinary and Second Extraordinary Sessions 1915." Said new section 34 reads as follows:

> "Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be quilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; *provided, however,* that druggists may receive and possess pure grain alcohol, wine and such preparations as may

> be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four."

It is not the theory of plaintiff's bill, prayer or evidence that Rozier is a druggist; indeed, the whole theory of the bill and prayer is, that the defendant carrier be required to accept from plaintiff and carry and deliver into West Virginia *all* intoxicating liquors tendered to it for carriage when for the personal use of the consignees. *We submit that the Court will not grant relief to the plaintiff in error, in any event, if the Court finds it cannot grant effectual relief.*

The Court Will Not Do a Vain Thing.

In Mills *v.* Green, 159 U. S., 651, at page 653, the Court said:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

To like effect is

Campbell *v.* California, 200 U. S., 87.

The cases of The State of Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 Howard, 421, and United States *v.* Schooner Peggy, 1 Cranch, 37, we submit, are strikingly in point.

Amendments Constitutional.

It will probably be contended by appellant that the legislature of West Virginia did not have the constitutional power to enact amended section 7 or the additional section 34, either under the state or federal constitutions. It will probably be said that the acts under consideration deprive the citizen of his guaranteed constitutional rights under (1) the constitution of West Virginia and (2) under the commerce clause of the constitution of the United States and the Fifth and Fourteenth Amendments to the federal constitution.

Counsel for appellant has heretofore relied very largely upon the case of State *v.* Gilman, 33 West Va., 146, particularly to sustain the contention that the Yost law and the amendments under consideration, construed as contended for by us herein, violate state and federal constitutions. We have hereinbefore in this brief analyzed the amendment of 1912 and by that analysis endeavored to show that the amendment deprived the legislature of the power to enact laws that would permit the manufacture or sale of intoxicating liquors in the state even for personal use. We have endeavored to show the purpose and intent of the constitutional amendment and the laws enacted pursuant thereto. We have endeavored to show that the Yost law and the amendments thereto have been enacted pursuant to the mandate of the amendment so as to carry into effect the intent and purpose of the amendment. Counsel for appellant can no longer rely upon the case of State *v.* Gilman *supra* to sustain their contention. It has been distinguished by the Supreme Court of Appeals of West Virginia in State *v.* Sixo, *supra.* Section 31 of the Yost law makes it an offense

> "for any person to bring or carry into the state or from one place to another within the state, even when intended for personal use, liquors ex-

ceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed or written on the top or side of the suit case, trunk or other container, in large display letters, in the English language, the contents of the container or containers, and the quantity and kinds of liquors contained therein."

Sixo had in his possession four quarts of whiskey, two quarts of rum and four pints of beer. Such liquors had been carried by him into the state, and he claimed the same were intended for his personal use. The court, stating the case, in part, says—87 S. E., 269 (Vol. 3) Jan. 8, 1916:

"But it is insisted by counsel for plaintiff in error that said section 31 of chapter 7 of the Acts of the legislature of 1915 is unconstitutional and void. Counsel argued at great length to prove that the legislature could pass no valid act making it an offense for a person to have in his possession liquors, unless for some improper purpose. The case of the State *v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847, is cited, among others, and relied upon as sustaining this contention. This court held in State *v.* Gilman that a statute—'which provides that no person without a state license therefor, shall 'keep in his possession, for another, spirituous liquors,' etc., is unconstitutional and void.'"

* * * *

"Since the case of State *v.* Gilman was decided, the Constitution of the state has been amended. The Constitution, as amended, prohibits the manufacture and keeping for sale of malt, vinous, and spirituous liquors, etc., and required the legislature to 'enact such laws, with regulations, conditions, securities, and penalties as may be necessary to carry into effect the provisions of this section.' This amendment became effective July 1, 1914. It is the duty of the Legislature to enact such laws as may be necessary to make effect-

ive this provision of the Constitution as amended. The Legislature, responsive to this requirement of the Constitution, has deemed it wise to require liquors brought into the state, or carried from one place to another within the state, in quantities of one-half gallon or more, to be marked or labeled. Whether or not this is a wise policy is not for the courts to determine. If the Legislature has not exceeded its powers, the courts cannot interfere. The courts may decide whether or not the Legislature had the power to establish these regulations, but they cannot prescribe the policy, if within the legislative limits; this would be to subordinate the will of the Legislature to the opinion of the courts.

"The regulations provided for in said section, requiring liquors brought into the state, or carried from one place to another within the state, exceeding in the aggregate one-half of one gallon in quantity, to be marked or labeled, do not seem to be unreasonable, or as imposing any hardship upon persons who do not wish to violate the law."

In the Sixo case the Court also held—fourth point of the syllabus—

"*It was within the legislative power to enact the statute named in the foregoing point and said part of said statute creating such offense does not conflict with any of the provisions of the constitution of the United States or of this state.*"

In State *v.* Davis, *supra,* the transactions were interstate and the intoxicating liquors seemingly intended for personal use. The Supreme Court of Appeals of West Virginia, in the Davis case, held the Yost law valid under the state constitution and did not violate the commerce clause of the federal constitution nor the privileges and immunities clause of the Fourteenth amendment to the federal constitution in determining the questions arising in the Davis case. Moreover the Supreme Court of

Appeals of West Virginia practically adopts the interpretation of Chief Justice Clark's concurring opinion in State *v.* Cardwell, *supra,* thereby giving to such concurring opinion peculiar weight in the case at bar, we submit, inasmuch as such concurring opinion is for all practical purposes the adopted interpretation of the Webb-Kenyon law and the application of the Webb-Kenyon law to the provision of the Yost law under consideration in the case.

Section 34 of the Yost law, made an additional section to the Yost law by the act of May 24, 1915, *makes it an offense for any person in appellee state to receive, or possess directly or indirectly, intoxicating liquors from a common or other carrier; the section, by its terms, applies to such liquors in interstate as well as intrastate shipments, and whether intended for personal use or otherwise,* subject to the exceptions in favor of druggists, etc. specified in the section. In principle section 34, comes, we submit, within the spirit of the interpretation by the Supreme Court of Appeals of West Virginia, of the provisions of the Yost law referred to in State *v.* Davis and State *v.* Sixo, *supra.*

Section 12 of the Bonner Law of Alabama makes it unlawful for any person, firm or corporation to receive or accept delivery of or to possess more than a specified quantity of intoxicating liquors within a specified period. The Supreme Court of Alabama in

> Southern Express Co. *v.* Whittle, 69 Sou. Rep., 652, held:
>
> "The Webb-Kenyon Law divests intoxicating liquors of their character with reference to interstate commerce in the cases contemplated and described in the act, and in such cases intoxicating liquors can only be regarded, when transported from one state into another, as if the federal Constitution had not contained the commerce clause,

and, so construed, the act is not invalid, as delegating federal authority to the states.

"The Webb-Kenyon Law prohibits the entering in interstate commerce of intoxicating liquors, where the purpose is unlawful under valid state statutes, and any valid exercise of the police power of the states is not a regulation of interstate commerce.

"Const. 1901, Sec. 1, guaranteeing the right of life, liberty, and the pursuit of happiness, and section 35, declaring that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and when the government assumes other functions it is usurpation, do not restrict the rightful exercise of the police power by the state; and the Legislature may ascertain when the welfare of the people requires the exercise of the police power, as well as what are appropriate measures to that end, subject only to the right of the courts to see that the measures of police do not arbitrarily violate constitutional rights.

"Bonner Law (Act. Feb. 8, 1915; Acts 1915, p. 44) Sec. 12, making it unlawful for any person, firm, or corporation to receive, or accept delivery of, or to possess more than a specified quantity of intoxicating liquors within a specified period, is a valid exercise of the police power, and does not conflict with Const. 1901, Section 1, 35, guaranteeing the rights of life, liberty, and the pursuit of happiness, and limiting the rightful functions of government.

"This section is not in conflict with Const. U. Amend, 14, as abridging the privileges or immunities of citizens of the United States, or as depriving the citizens of life, liberty or property without due process of law.

In this case the Alabama court declined to accept as authorities Eidge *v.* City of Bessemer, 164 Ala. 599, and State *v.* Gilman, supra.

Chapter 97, Public Laws 1915, of the State of North

Carolina, contains provisions of very similar character to the Bonner law of Alabama. The Supreme Court of North Carolina, in Glenn *v.* Southern Express Co., 87 S. E., 136, (Vol. No. 2, January 1, 1916) held:

> "Prior to any legislation by Congress, the right to sell in the original package was inherent in the shipment of intoxicating liquors from one state to another; and while this right could not be interfered with by the state, it could be withdrawn by Congress.
>
> "It is within the constitutional power of Congress to remove the impediment of the protection of interstate commerce to the enforcement of state laws and to subject intoxicating liquors to laws enacted by the states in the exercise of the police power upon their arrival in the state; and such action of Congress is not a delegation or grant of power to the state, but is a regulation of Congress, and the uniformity of such regulation is not affected by variations in state laws.
>
> "The Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699. [U. S. Comp. St. 1913, Sec. 8739]), prohibiting the transportation of intoxicating liquors into a state, to be received, sold, or used in violation of state laws, thereby divesting such shipments of their protection under the commerce clause of the federal Constitution, but not expressly designating any power to the states, is constitutional.
>
> "The 'police power' is a power originally and always belonging to the states, which was not surrendered by them to the general government, and is the power to protect the lives, health, safety, and property of its citizens, and to preserve good order and public morals, and to govern men and things by any legislation appropriate to that end; a power which is, and from its very nature must be, incapable of any very exact definition or limitation.
>
> "Pub. Laws 1915, c. 97, entitled 'An Act to restrict the receipt and use of intoxicating liq-

uors', enacted as a means of enforcing the state policy of prohibition, in section 1 making it unlawful to ship, carry or deliver in any one package or at any one time from a point within or without the state to any person in the state any intoxicating liquors in a quantity greater than one quart, in section 2 making it unlawful for any person to receive at any one time, or in any one package, at a point in the state for his use, more than one quart of intoxicating liquor, and in section 3 making it unlawful for any person during 15 consecutive days to receive more than one quart of intoxicating liquors, is a legitimate and reasonable exercise of the police power.

"The Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699 [U. S. Com. St. 1913, Sec. 8739]) prohibits the transportation of intoxicating liquors into a state to be received, sold, or used in violation of state law, thereby divesting such shipments of their protection under the commerce clause of the Constitution. Pub. Laws 1915, c 97, Sections 1-3, makes it unlawful to ship, carry, or deliver more than one quart of intoxicating liquor in any one package, or at any one time, from a point within or without the state to any person within the state, and makes it unlawful to receive more than one quart of intoxicating liquor in 15 days. *Held,* that an express company which had brought into the state and delivered to plaintiff a quart of whiskey, was not liable for refusing to deliver another quart to him on the following day, or for refusing to accept, at a point in another state, a consignment of a gallon of whiskey to plaintiff in this state.

While the laws of Alabama and North Carolina are not, in identical terms nor provisions, the same as amended section 7 and additional section 34 of the Yost law, yet it is submitted that, in principle the laws considered by the courts of Alabama and North Carolina, and the laws being considered here, are alike in principle and

that the reasons and principles governing the Alabama and North Carolina cases also control and govern said amended section 7 and said additional section 34 of the Yost law.

FIFTH.

Webb-Kenyon Law and Yost Law Are Not in Contravention of Commerce Clause of the Federal Constitution or the Fifth and Fourteenth Amendments Thereof.

Counsel for appellant will probably contend

> "that if the constitution and laws of West Virginia properly construed have the effect given them by the judgment below, that they are in contravention of the commerce clause of the Constitution of the United States and the Fourteenth Amendment; that the Act of Congress of March 1, 1913, known as the Webb-Kenyon Law does not authorize the state of West Virginia to apply its constitution and laws to interstate commerce in liquors for personal use, in the manner in which they were applied by the court below; that if the Webb-Kenyon Law does authorize the state of West Virginia to so apply its constitution and laws to such commerce, the Webb-Kenyon Law is repugnant to the commerce clause of the Constitution of the United States and the Fifth Amendment."

Webb-Kenyon Law Is Constitutional.

We submit the Webb-Kenyon law does not delegate to the states any power that Congress has over interstate commerce; nor does it confer upon the states the power to regulate interstate commerce. *Congress did, however, in its enactment, simply withdraw from intoxicating liquors the protection of the interstate commerce clause of the Federal constitution, when such liquors are shipped into a state in violation of its laws.*

The Wilson act has been held to be constitutional and has been applied in such cases as In re Rahrer, 140 U.

S., 545, and Delamater *v.* Dakota, 205 U. S., 93. The Webb-Kenyon law is the same in principle as the Wilson act, but goes further and is more drastic.

The proposition is so briefly, and yet so clearly, stated, by the United States Circuit Court of Appeals in State of West Virginia *v.* Adams Express Co., 219 Fed., page 802 of the opinion, that we now here quote the same.

> "The constitutionality of the Webb-Kenyon statute is attacked on the ground that it is an attempt by Congress to confer on state legislatures the power to regulate interstate commerce. This we think, is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often decided. *Ex parte,* Rahrer, *supra.* Lottery Case, 188 U. S., 321, 23 Sup. Ct. 321, 47 L. Ed. 492; Hoke *v.* United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed., 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913, E, 905; Hipolite Egg Co. *v.* United States 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364. The distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules of admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat.
>
> "The following language of Mr. Justice White in Vance *v.* Vandercook, 170 U. S., 438, 18 Sup. Ct., 674, 42 L. Ed. 1100, referring to the regulations of the South Carolina dispensary law, was cited here and has been cited elsewhere as giving countenance to the notion that the Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license state to a prohibition state:
>
> > " 'On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the state and of the resident in the state to receive for his own

use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of a citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the state; it takes its origin outside of the state of South Carolina, and finds its support in the Constitution of the United States.'

"It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the states, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.

"As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by common carriers into particular states when such transportation would be especially injurious to the public interest, in that, when they reach the state, they will derange and make inefficacious the police measures for the control of intoxicants which the state has seen fit to adopt. The courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the states of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy."

State Laws Are Constitutional.

The states are possessed of their reserved police power.

This power they did not surrender to the federal government. It must be conceded that the state is possessed of the power to forbid sales of intoxicating liquors within its own borders, even when intended by the buyer for personal use. WOULD IT BE SUGGESTED THAT ONE CAN SELL TO ANOTHER INTOXICATING LIQUORS WITHIN THE BORDERS OF THE STATE, EVEN FOR PERSONAL USE, WHEN THE LAW OF THE STATE FORBIDS THE SALE OF SUCH LIQUORS? IF THE STATE CAN DENY THE OUTSIDE DEALER THE RIGHT TO SOLICIT ORDERS FROM ITS CITIZENS, UNDER THE WILSON LAW, WHEN THE CITIZENS DESIRE THE INTOXICATING LIQUORS FOR PERSONAL USE, WITHOUT VIOLATING THE FEDERAL CONSTITUTION AND AMENDMENTS ABOVE REFERRED TO, (*Delamater* v. *S. Dakota*, 305, U. S., 93; *State* v. *Miller*, 66 W. Va., 436) WHY CANNOT THE STATE, SINCE THE ENACTMENT OF THE WEBB-KENYON LAW, DENY THE RIGHT OF SHIPMENT OR TRANSPORTATION OF SUCH LIQUORS INTO THE STATE FOR SUCH PERSONAL USE? IF THE STATE CAN DENY ITS CITIZENS THE RIGHT TO PURCHASE INTOXICATING LIQUORS FROM ONE ANOTHER, FOR PERSONAL USE, WITHIN THE STATE, WITHOUT VIOLATING THE FEDERAL CONSTITUTION AND AMENDMENTS ABOVE REFERRED TO, WHY CAN IT NOT NOW DENY ITS CITIZENS THE RIGHT OF SHIPMENT TO THEM, BY A CARRIER, OR RECEIPT OR POSSESSION FROM SUCH CARRIER OF SUCH LIQUORS FOR SUCH USE? WE SUBMIT THE STATE CAN DO SO FOR THE APPARENT REASON THAT CONGRESS HAS DIVESTED INTOXICATING LIQUORS OF THEIR INTERSTATE CHARACTER, WHEN THE "SHIPMENT" OR "TRANSPORTA-

TION" THEREOF INTO A STATE, IS IN VIOLATION OF THE LAWS OF THE STATE.

County local option laws have been repeatedly upheld. Provisions in such laws forbidden shipments into counties for personal use have been repeatedly upheld, when the shipments were intrastate. Indeed we do not recall any decision to the contrary.

The effect of such local option laws, depriving, or tending to deprive, a citizen of intoxicating liquors for his personal use, has never led the courts to declare such laws, a deprivation of the constitutional rights, state or federal, of the citizen. Since the enactment of the Webb-Kenyon law, we submit, the same principle is now applicable to *interstate* shipments, that is applicable to *intrastate* shipments under local option laws.

In the majority report from the House Committee of the Judiciary, respecting the Webb-Kenyon Act, report No. 1461, 62d Congress, 3d Session, Feb. 7, 1913, hereinbefore referred to, this language is used:

> "This bill might well be styled a local option act to give the various states the power to control the liquor traffic as to them may seem best. It would remove the shackles of interstate commerce law from the action of the states and discontinue the handicap under which they now labor, in enforcing their police regulations, and leave them freer to break up the blind tigers and bootleggers that infest many dry states."

Several of the state courts of last resort have sustained the constitutionality of the Webb-Kenyon law, and in the construction and application thereof to their several respective laws have sustained the views now contended for in this brief. Particularly do we rely upon such cases as State *v* Adams Express Co. (C. C. A.) 219 Fed. 794, concurring opinion Chief Justice Clark in State *v.* Cardwell, (N. C.) 81 S. E., 630, State *v.* U. S. Express Co.,

(Iowa) 145 N. W., 451, So. Express Co. *v.* Whittle, 69 Ala., So. 652, Glenn *v.* Express Co. (N. C.) 87 S. E. 136, State *v.* Davis, (W. Va.) 87 S. E., 262. In as much as many of these cases have been referred to at more or less length and must therefore necessarily come to the attention of the court, this brief will not be encumbered by quoting from the cases cited.

SIXTH.

Conclusion.

At the time this brief is in preparation, the uppermost question of discussion in the Union is "preparedness."

This court has heretofore spoken for real preparedness in no uncertain tones. In the following cases the court has said:

> "By the general concurrence of opinion of every civilized and Christian community there are few sources of crime and misery to society equal to the dram shop where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as a proper subject of legislative regulation. * * * * * * There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of a state, or a citizen of the United States, and as it is a business attended with danger to a community it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evil." Crowley *v.* Christensen, 137 U. S. 86.
>
> "It is not necessary for the purpose of justify-

> ing the state legislation now under consideration to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. * * * For we cannot shut out of view, within the knowledge of all, that the public health, the public morals and the public safety, may be endangered by the general use of intoxicating liquors; nor the fact, established by statistics accessible to every one that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, attributable to this evil." Mugler *v.* Kansas, 123 U. S. 623.

Contemporaneous events and the daily experience of sister nations now engaged in the greatest war the world has known all emphasize that a clean strong citizenship is the first essential of preparedness. Back of the munitions plant, back of the great gun, back of the trench, must be the man—the moral and physical man. Back of the man in the trench must be the man that directs the movements of millions of men; and back of the man in supreme authority must be a virile citizenship standing for civic and national righteousness. A citizenship not undermined by vice that unfits the mind to grasp the full duty of citizenship or unfits the body to defend the nation, whether in the shop, the field or in authority.

The great nations now at war have learned that one of the first essentials to preparedness is rigid restriction, or prohibition, of the use of intoxicating liquors—not alone as to the man in the field but to the citizens at home. The leading cabinet member of one of the great warring nations has recently declared his nation is fighting three great enemies, the greatest enemy being intoxicating liquors.

History teaches that all the great nations that have risen to splendor and fallen to decay were brought to their decline and end, not so much by forces without as the undermining forces within—forces within, which destroyed the morals and virtues of the citizens and thereby destroyed the nation's first line of defense—a healthy, vigorous and righteous citizenship.

Immediately following the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the case of State *v.* Adams Express Company, decided January 13, 1915, cited herein, the common carriers operating in appellee state have refused to carry intoxicating liquors into the state as freight or express. The people of the state, almost without exception, are satisfied and do not desire the existing condition disturbed. In the mean time much good has come to the people of the state by reason of the prohibitory laws. Men have saved their means, women and children have been better fed and clothed, and there has been a general increase in happiness and contentment, and an uplift toward a better citizeship. To grant appellants prayer means to largely destroy much of the good that has been accomplished, and to turn back the march of progress.

It is submitted appellant should be denied the relief sought by it.

Respectfully submitted,

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